

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)  
)

Implementation of the Local Competition )  
Provisions of the Telecommunications Act )  
of 1996 )  
)

CC Docket No. 96-98

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COMMENTS OF COVAD COMMUNICATIONS COMPANY  
TO SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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## SUMMARY

The Commission should take advantage of the opportunity granted by the Supreme Court's remand to define unbundled network element rules in a manner that will best promote Congressional intent by facilitating the rapid deployment of competitive telecommunications services such as xDSL. Covad is in the midst of an extensive, nationwide xDSL network build-out that relies upon the availability of unbundled DSL-conditioned loops, unbundled dedicated transport, unbundled DS3 links, and related OSS. A clear, predictable set of national unbundling rules is essential for this deployment and the deployment of similar networks by other CLECs.

In drafting its "necessary" and "impair" legal standard, the Commission should be mindful that CLECs offering xDSL services like Covad require minimum national standards in order to present to customers and the investment community a single, unified business plan for providing these services nationwide. Creating an exemption process that would require CLECs to engage in market-by-market or other geographic type analysis so as to continually "re-justify" the availability of those elements would significantly increase legal costs and introduce unnecessary regulatory uncertainty into the process. Needless to say, Covad is much more interested in concentrating on the day-to-day issues of building a network and selling services—not in participating in the *Bleak House* style of litigation in which the ILECs revel.

The Commission's necessary and impair standard must be drafted with an understanding as to why Congress required unbundling in the first place. Most tellingly, Congress ordered that ILECs unbundle their networks because—as a result of their historical government-granted monopoly—those incumbent networks possess economies of scale, scope, density and connectivity that cannot feasibly be replicated by other

providers. If competing carriers are not able to share those economies, the ILECs would have an insurmountable competitive advantage once the local market was opened to competition. ILEC failure to fully unbundle in the three years since the Act—and their strenuous arguments before Congress and this Commission that they need exemptions from unbundling—demonstrates the importance of these facilities.

In order to achieve Congressional intent, Covad proposes a “necessary” and “impair” standard that focuses upon whether alternative facilities share comparable economies of scale, scope and density as the ILEC networks. In examining alternative sources of supply, Covad suggests that the Commission use well-accepted principles of competitive analysis to determine whether there is indeed a competitive wholesale market for the element. This analysis would take into account a number of factors, including the elasticities of demand and supply, the existence of a wholesale market, pricing trends, and market share analysis. Even if this threshold is met, unbundling may still be necessary to advance other objectives of the Act. The statutory requirements of Section 251(d)(2) contemplate Commission consideration of such factors, including the need for consistent national rules and the promotion of competitive broadband services to all Americans.

Covad recognizes that the Commission’s unbundling requirements reflect changing market conditions. This goal, however, must be balanced against the need to provide stable and predictable rules that are critical to facilitate new entry into local telecommunications markets. Covad suggests that the biennial regulatory review required by Congress in the 1996 Act is the best forum for the Commission to review its unbundling requirements. The biennial review provides a forum for all state

commissions and the industry to provide unified comments on these issues of national importance.

If the Commission feels the need to establish some kind of market-by-market or element-by-element test, triggered by ILEC exemption petitions, ILECs must bear a substantial burden of production and proof before they obtain any exemption. In addition, the Commission should establish rules in which the ILEC would fully compensate CLECs for CLEC costs incurred in such a proceeding if the final result of that proceeding results in no change to the unbundling rules. Without such a rule, the ILECs will have every incentive to leverage their legal staffs in proceedings that will simply raise the costs of CLECs and other new entrants.

With regard to specific unbundling rules, Covad proposes that the Commission define several unbundled network elements—DSL-conditioned loops, dedicated transport, and DS3 customer links. Unbundled access to OSS related to the provision of these elements also must be required. It is time for ILECs to stop giving the Commission and competitive carriers “excuses” about their failure to provide unbundled DSL-conditioned loops *throughout* their service territories—not just to the select few that the ILEC chooses to serve. Unbundled DSL-conditioned loops must be made available, regardless of ILEC DSL deployment plans, regardless of the presence of remote terminal devices, and regardless of arbitrary “loop length” restrictions unilaterally imposed by the ILEC. Universal availability of DSL-conditioned loops will clearly promote the provision of broadband services to all Americans.

In these comments, Covad provides a substantial body of evidence supporting its position that these elements meet the unbundling test articulated above. Covad’s

proposed rules. In particular, Covad provides a detailed assessment of its dependence on unbundled ILEC dedicated interoffice transport and ILEC DS3 customer links. ILEC dominance of the markets for these services to Covad is overwhelming.

To assist the Commission, Covad is submitting a set of draft rules (Attachment 1).

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This proceeding presents the Commission with a significant opportunity to accelerate the competitive deployment of advanced xDSL services to American consumers. The Supreme Court's decision in the *Iowa Utilities Board* case affirmed the Commission's primary role in implementing the Telecommunications Act of 1996 (the "1996 Act").<sup>1</sup> As a result, the Commission can now look back at three years of market experience, build upon the record developed in the *Advanced Wireline Services* proceeding and affirmatively reassert that the unbundling principles of Section 251(c)(3) apply to the advanced networks of the future<sup>2</sup>. In doing so, the Commission will once again ratify Congress's dynamic vision of this industry, which is characterized by rapid technological change and potential innovation.

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<sup>1</sup> 47 C.F.R. § 51.319; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*First Local Competition Order*"), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997), *aff'd in part and vacated in part sub nom., Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *rev'd in part and aff'd in part and remanded sub nom., AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999) ("*Iowa*").

<sup>2</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 (1998) ("*First Advanced Wireline Services Order*"), Second Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 99-48 (rel. March 31, 1999) ("*Second Advanced Wireline Services Order*").

Covad Communications Company ("Covad") is a start-up telecommunications company focused *entirely* upon deployment of competitive xDSL services nationwide. Covad's planned network deployment by the end of 1999 will cover 51 MSAs, more than 25% of the nation's homes and businesses. Covad's service is already available to well over 11 million homes and business.<sup>3</sup> This is a large-scale, national roll-out, based upon the nationwide availability of collocation, unbundled dedicated transport, and unbundled local loops. As a result, Covad strongly urges that the Commission preserve its minimum national standards for unbundling.

Covad's comments are organized as follows: Section I describes the Commission's proposals in ¶¶ 13-14 of the *Notice* on the need to establish minimum national standards for unbundling.<sup>4</sup> In Section II.A, Covad presents its proposed balancing test for identifying unbundled network elements pursuant to Sections 251(d)(2) and 201(b) of the Communications Act of 1934, as amended (the "Act"), which responds to ¶¶ 15-31 of the *Notice*. Section II.B discusses procedural aspects of proceedings for identifying unbundled network elements, responding to ¶¶ 11-12 and ¶¶ 41-42 of the *Notice*. Finally, Section III discusses several specific unbundling requirements (¶¶ 32-40 of the *Notice*), including conditioned loops, dedicated interoffice transport, and DS3 customer links.

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<sup>3</sup> Covad Communications Company, "Covad Communications Announces First Quarter Results," April 23, 1999 (11.2 million homes and businesses passed, an increase of 87% over December 31, 1998). Since that April 23 release, Covad has launched its service in two additional regions, Chicago and San Diego.

<sup>4</sup> Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-70, 64 Fed. Reg. 20238 (April 26, 1999) ("*Notice*").

## **I. THE NEED FOR MINIMUM NATIONAL UNBUNDLING STANDARDS**

Covad strongly agrees with the Commission's tentative conclusion that it promulgate national minimum standards for unbundled network elements ("UNEs").<sup>5</sup> Only the national availability of certain core UNEs will create an environment of vibrant competitive entry into broadband telecommunications markets.

The Commission must remember that unbundling is a means to an end. The 1996 Act is designed to put in place a "national policy framework" for competition in *all* telecommunications markets, including markets for broadband services.<sup>6</sup> The unbundling required by Section 251(c)(3) of the Act, by permitting competitive local exchange carriers ("CLECs") access to fundamental and critical infrastructure of incumbent local exchange carriers ("ILECs"), is at the core of the Act's market-opening provisions and clearly fits within this framework of promoting the rapid development of competition and the availability of competitive broadband services to *all* Americans.<sup>7</sup>

In building the nation's largest xDSL network, Covad is focused upon obtaining access to some fairly basic yet critically important network facilities that are still controlled by the ILECs—the ubiquitous ILEC wires that connect homes and businesses to the local central office and the similarly ubiquitous ILEC wires that connect those central offices to

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<sup>5</sup> Notice at ¶ 14 ("We find nothing in the Supreme Court's decision that calls into question our decision to establish minimum national unbundling requirements. We therefore tentatively conclude that the Commission should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis.").

<sup>6</sup> Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong. 2d Sess. 1 (1996); Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 157 note.

<sup>7</sup> *Second Advanced Wireline Services Order* at ¶ 13. In the *Second Advanced Wireline Services Order*, the Commission called competitive broadband competition a "fundamental goal[]" of the 1996 Act. *Id.* at ¶ 1.

one another in a seamless, networked web. The predictable and national availability of those elements has clearly been necessary to advance Congress's goal of promoting broadband deployment by competitive companies like Covad.

**A. National Rules Will Promote Entry**

Competition in telecommunications markets cannot happen unless there is *entry* into those markets. It is all too easy to assume simply that local telecommunications competition is inevitable, and that well-financed CLECs are simply "waiting in the wings," eager to jump in and take advantage of whatever type of entry strategy is possible.

But it is not necessarily true.<sup>8</sup>

The breadth and scope of CLEC entry is highly dependent on the regulatory climate, the reluctant cooperation of the ILEC, and, of course, the presence of barriers to entry. Unbundling was designed by Congress to *lower* these barriers to entry, by requiring incumbent LECs to share the economies of scale, scope and density of their local networks.<sup>9</sup> While the decision to serve any particular market is not exclusively dependent upon those factors, the geographic breadth and product scope of a CLEC's offerings in that

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<sup>8</sup> A forthcoming book by Richard Tomlinson, President of Connecticut Research, Senior Associate with New Paradigm Resources Group, Inc. and widely regarded as the leading observer/historian of the CLEC movement, will discuss how competitive inroads are due to sometimes serendipitous events. See New Paradigm Resources Group, Inc., *1999 Annual CLEC Report*, Chapter 2, pp. 3-4. As the Tomlinson points out, one of the critical obstacles is financing: "Capital for expansion was a problem, however. . . . [T]he financial hardships of ICC [a DC-area CAP] had a sobering and significant effect on the willingness of investors to back CAPs and other start-up competitive telecommunications companies. *It had become clear that simply putting fiber in the ground and challenging the local telephone company was not a guaranteed route to riches. . . .* [F]or those that survived, most faced at least one critical point at which the odds against success appeared insurmountable." *Id.* (emphasis added).

<sup>9</sup> *First Local Competition Order*, 11 FCC Rcd 15499 at ¶ 11 (1996) ("As we pointed out in our NPRM, the local competition provisions of the Act require that these economies be shared with entrants.").

market may be entirely dependent upon those regulatory factors, including the pricing and availability of UNEs.

The cost and availability of unbundled network elements—particularly unbundled dedicated transport and local loops and related operation support systems (“OSS”)—are key regulatory factors. The predictable availability of UNEs is necessary because it permits facilities-based CLECs to scale their network build-out in a flexible manner.<sup>10</sup> By definition, a CLEC desiring to offer xDSL services must have access to the copper loop infrastructure—indeed, xDSL technology was *invented* to take advantage of that installed copper loop base. As a result, competitive deployment of a mass-market, consumer-grade xDSL service to residential users largely depends upon national availability of loop elements and predictable pricing standards.<sup>11</sup>

Covad’s history demonstrates why it is important for national rules to firmly and resolutely establish uniform unbundling requirements. Covad began offering xDSL services in December 1997 over unbundled loops and transport in only one market—the San Francisco Bay Area. However, within a few short months of that launch, Covad was able to acquire the capital to export that same business plan to *twenty-two* markets

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<sup>10</sup> See DOJ/FTC Horizontal Merger Guidelines, §§ 3.3, 3.4 (1992); see also Long Distance Affidavit of Robert Harris, on behalf of GTE Corp. *Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control*, CC Docket No. 97-211, March 13, 1998 at ¶ 69 (“Harris Long Distance Affidavit”) (“A critical consideration when examining the likelihood of entry is whether entrants may flexibly choose their scale.”).

<sup>11</sup> Last month, Covad rolled out its TeleSurfer residential consumer DSL service. Covad Communications Company, “Covad Brings High-Speed DSL Internet Access Home,” April 20, 1999, [http://www.covad.com/about/press\\_releases/press\\_042099.html](http://www.covad.com/about/press_releases/press_042099.html). Even those arguing against unbundling “advanced services” elements have recognized the importance of unbundling the local loop. See Robert W. Crandall & Charles L. Jackson, *Eliminating Barriers to DSL Service* at 42 (July 1998) (unpublished manuscript on file with Covad) (“Loop unbundling will provide a market constraint on the prices LECs can charge for DSL services.”).

nationwide. The nationwide existence of a pro-competitive, predictable regulatory regime played an important role in this process.

If unbundling were available only in patchwork fashion, competitive xDSL entry would *also* only be available in a patchwork fashion—a result clearly inconsistent with this Commission’s policy of promoting broadband services and Congress’s intent in establishing a national policy of unbundling. Therefore, Covad strongly agrees with the Commission’s tentative conclusion in paragraph 14 of the *Notice* that it establish national minimum standards for unbundling in Rule 51.319. To do otherwise would raise the cost of CLEC entry and, consequently, delay—perhaps permanently—the competitive benefits in the provision of broadband services.

**B. States Should Not be Permitted to Give ILECs UNE Exemptions**

The Commission has requested comment as to whether state commissions should be permitted to grant exemptions, which would re-write federal unbundling rules so as to limit the availability of UNEs in their respective states, subject to some form of competitive availability test and review by the Commission.<sup>12</sup> Covad does not believe that such a mechanism is consistent with the 1996 Act and sound public policy.

Section 251(d)(2) of the Act is clear—it directs the *Commission* to determine the unbundled network elements that incumbent LECs must provide to requesting carriers. This directive is unambiguous. Nothing in the Act suggests that the States are to play any role in defining or identifying any particular unbundled network elements.<sup>13</sup> Given

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<sup>12</sup> *Notice* at ¶ 14.

<sup>13</sup> Indeed, Justice Scalia’s opinion makes it very clear that the 1996 Act vests the Commission with responsibility for adopting *federal* regulations to implement the *federal* policy of nationwide local

Congress' specific assignment of responsibility to the Commission, the agency does not have the discretion to delegate to the States the task of identifying the elements to be unbundled.

Requiring the FCC to exercise exclusive responsibility for identifying UNEs is consistent with the structure of the 1996 Act. The 1996 Act established a "national policy framework" for opening up local markets to competition.<sup>14</sup> As the Supreme Court recently ruled, the FCC is the primary agency charged with adopting regulations necessary to enforce the Act.<sup>15</sup> The statute envisions uniform Commission rules relating to the local telecommunications competition provisions, not a patchwork quilt of exceptions and exemptions.<sup>16</sup>

Broadly delegating this power to the states would not be sound policy. The 1996 Act seeks to bring consumers the benefits of local competition as rapidly as possible. Only uniform national rules will do the job. Delegating significant rulemaking authority to the States would impede achievement of this goal. If the Commission delegates this authority, the ILECs will almost certainly initiate proceedings in most—if not all—States to obtain "relief" from their unbundling obligations. At a minimum, this will result in significant

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competition. *Iowa*, 119 S.Ct. 730 n.6 ("the question in this case is not whether the Federal Government has taken the regulation of local telecommunications away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.").

<sup>14</sup> Joint Statement of Managers at 1 (1996 Act established a "pro-competitive, deregulatory national policy framework"). The 1996 Act must be seen as a sea change in telecommunications policy Justice Scalia wrote, "Congress has broadly extended its law into the field of intrastate telecommunications . . . ." *Iowa*, 119 S.Ct. 733 n.10.

<sup>15</sup> The Court stated that "[t]his is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the Federal Courts that draw lines to which they must hew." *Iowa*, 119 S.Ct. 730 n.6.

delay. In many cases, moreover, CLECs—which lack the incumbents’ deep pockets and massive in-house legal staffs—will be unable to challenge all of these ILEC assaults. The end result will be adoption of rules that significantly CLECs ability to enter the market.

The Commission already has a statutory mechanism to assess its unbundling rules regularly—the biennial review required by Section 11 of the Act. The Commission should actively seek out state commission participation in that review. In that review, the Commission should make any needed changes to its national rules.

Assuming *arguendo* that the Commission decides that it would be appropriate to provide state-specific exceptions, the Commission should retain exclusive authority to grant such exemptions, subject to clear standards governing the circumstances in which such an exemption will be granted. Under this approach, the Commission would specify standards and procedures (consistent with those proposed by Covad in Section II.B below) for the states to follow in preliminary proceedings. However, no state decision finding that the exemption standards have been met should go into effect unless the Commission has ratified that decision.<sup>17</sup>

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<sup>16</sup> Not only does Section 251(d)(2) of the Act refer only to the Commission’s role in “identifying” UNEs, but Section 201(b) “explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.” *Iowa* 117 S.Ct at 730.

<sup>17</sup> This would permit the FCC to utilize the strengths of the state commissions in developing facts, yet retain final authority. The Commission must retain final authority, or it would abdicate its responsibility with regard to interstate communications and implementation of the 1996 Act. For example, in *New York Telephone Company v. FCC*, 631 F.2d 1059 (2<sup>nd</sup> Cir. 1980), the Commission allowed the States to regulate local exchange service used in connection with foreign exchange (“FX”) lines. However, when the New York Public Service Commission used this delegated authority in a manner that discriminated against interstate FX customers, in violation of FCC policy, the FCC preempted the State decision and asserted federal authority. The Second Circuit upheld the FCC’s action, finding that the FCC had “reserved its ability to regulate local exchange service in situations in which there is discrimination against interstate services.” *Id.* at 1065. The FCC should make a similar reservation of authority here, because state regulation of the availability of UNEs unquestionably impacts the implementation of the Act, a duty which Section 201(b) charges to the Commission, and the cost and availability of interstate telecommunications services. The

## **II. THE STANDARD AND PROCESS FOR IDENTIFYING UNBUNDLED ELEMENTS UNDER SECTION 252(d)(2)**

In this Section, Covad examines several aspects of the "UNE identification" process that Section 251(d)(2) of the Act requires. In revisiting its implementing rules, the Commission should seek to minimize the ability of incumbent LECs to "game" this process in a manner that will stall CLEC entry.

In Section II.A, Covad outlines its proposed substantive standard for the UNE-identification process required by Section 251(d)(2) of the Act. Covad argues that, consistent with the express statutory language, the "necessary" and "impair" considerations are not the only factors the Commission should consider in identifying UNEs. In Section II.B, Covad presents several procedural and burden of proof proposals that the Commission should employ in the UNE-identification process that will, in Covad's opinion, best utilize limited regulatory resources and minimize the potential for ILEC anti-competitive gamesmanship.

### **A. The Substantive Standard for Identifying UNEs under Section 251(d)(2)**

Since the Supreme Court's decision, virtually all attention has been upon the words "necessary" and "impair" standard, while the remaining clear statutory language in Section 251(d)(2) has been virtually ignored. Section 251(d)(2) does *not* provide the Commission with a rule of decision, it only requires that the Commission "consider, at a minimum" the

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Eleventh Circuit reached a similar conclusion in the now-familiar *MemoryCall* case. *Georgia PSC*, No. 92-8257, 1993 U.S. App. LEXIS 24458 (11<sup>th</sup> Cir. Sept. 22, 1993). In that case, the FCC allowed the States to regulate carrier-provided voicemail (an enhanced service). When Georgia ordered BellSouth to cease providing the service to new customers, including those who use the service to receive interstate messages,

necessity of access and the impact a lack of access would have on the ability of CLECs to provide service.<sup>18</sup> The Supreme Court does nothing more than require the Commission to “determine on a rational basis which network elements must be made available *taking into account the objectives of the Act* and giving *some substance* to the ‘necessary’ and ‘impair’ requirements.”<sup>19</sup>

As the Commission rightly points out, “consider” is a rather low threshold to meet,<sup>20</sup> as is the Court’s admonition to give “some substance” to the “necessary” and “impair” requirements. The Court’s decision, moreover, affirmatively directs the Commission to “tak[e] into account the objectives of the Act” in the UNE-identification process. Therefore, the 1996 Act’s goal of rapid nationwide entry and the deployment of competitive broadband services certainly can justify the identification of a particular element, even if the “necessary” and “impair” standards—while “consider[ed]”—may not be satisfied.

Covad proposes that the Commission adopt the following balancing test to determine the UNEs that the ILECs must provide. These factors are all grounded in the objectives of the Act. As a result, Covad proposes that *all* of these factors should be “consider[ed]” in this and future proceedings, subject to the weighting described in Section II.A.4 below.

■ The “Necessary” and “Impair” Considerations of Section 251(d)(2).

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the FCC preempted the Georgia decision and allowed BellSouth to continue to offer the service subject to the FCC-approved CEI plan.

<sup>18</sup> 47 U.S.C. § 251(d)(2).

<sup>19</sup> *Iowa*, 119 S.Ct. at 736.

<sup>20</sup> *Notice* at ¶ 29.

- Whether availability of the UNE on a predictable, national basis would facilitate rapid entry as envisioned by the Act.<sup>21</sup>
- Whether access to the UNE would promote the competitive deployment of advanced services to all Americans.<sup>22</sup>

Each of these considerations are addressed in turn.

### **1. The Necessary and Impair Considerations**

Covad's proposals for defining the terms "proprietary", "necessary" and "impair" are substantially similar to the standard proposed by ALTS and that other facilities-based CLECs in this proceeding. Covad believes that these definitions meet the Supreme Court's requirements and are robust enough to ensure the competitive availability of broadband, xDSL services to American consumers.

Covad would like to highlight attention to several important aspects to the ALTS definitions of "proprietary", "necessary" and "impair".

#### **a. The "Necessary" Consideration with Regard to Proprietary Elements**

Covad proposes a three-step analysis to determine whether a proprietary element must be unbundled pursuant to Section 251(d)(2)(A). First, the Commission should examine whether the particular element is indeed "proprietary". Second, the Commission should examine whether any "reasonable substitute" would provide the requesting carrier with "comparable functionality." Finally, the Commission must determine whether there is

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<sup>21</sup> This factor is consistent with the Commission recognition in paragraph 2 of the *Notice* that the national availability of UNEs "is integral to achieving Congress' objective of promoting rapid competition" and to "reduce uncertainties in the market."

<sup>22</sup> 47 U.S.C. § 157 note.

a demonstrably open, competitive, wholesale market that provides CLECs with access to those substitutes at rates comparable to the cost-based levels that the Commission's TELRIC methodology is designed to replicate. All three steps must be analyzed in the Commission's "consider[ation]" of this factor.

*Need for "Proprietary" Elements.* The Commission should establish an overriding principle that the ILEC cannot render a particular element "unbundleable" by deploying a proprietary system, equipment, interface or protocol whenever a comparable non-proprietary substitute is available. If an element does not meet this test, it should be subject only to the "impair" consideration. Application of this principle would encourage the deployment of "open network" equipment.<sup>23</sup> In addition, the proprietary interests of third-party vendors cannot be used by an ILEC to invoke Section 251(d)(2)(A).<sup>24</sup>

*Identification of "Comparable Substitutes" which provide "Comparable Functionality."* This factor takes into account both demand and supply side factors.<sup>25</sup> Most particularly, the Commission must focus upon whether the requested ILEC element

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<sup>23</sup> The Commission should, incidentally, require ILECs to take into account their unbundling obligations in purchasing new equipment. Otherwise, ILECs would have incentive to acquire proprietary equipment and systems not because the equipment or system is better but because it would limit CLEC entry.

<sup>24</sup> The Commission should be especially concerned about ILECs deploying "proprietary" integrated digital loop carrier systems ("IDLCs"). IDLCs integrate a remote terminal device with the switch, and may involve proprietary interfaces at the central office level. Deployment of DSLAMs in IDLC arrangements has apparently already begun by ILECs. See US West, "U S WEST Unveils Technology Enhancements that Nearly Double Number of Customers who can Receive its Lightning-fast ADSL Internet Service," Oct. 28, 1998, <http://www.uswest.com/news/102898.html> ("In the first quarter of 1999, U S WEST will begin targeted deployment of remote services solutions that enable customers currently served by Digital Loop Carriers (DLCs) to get MegaBit Services. . . . The solution initially involves placing MegaBit equipment in the field adjacent to metal cabinets that house DLCs . . .").

<sup>25</sup> In the language of the Commission's well-established competitive analysis, this step may be regarded as the "market definition" and "identification of competitors" steps. For a comprehensive discussion about this process, see *Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer of Control, Memorandum Opinion and Order*, 12 FCC Rcd 19985 (1997) ("BA/NYNEX Merger Order").

substantial economies of scale, scope and density that are not possessed by other products or services. The Commission should firmly establish that a "reasonable substitute" is *not* present unless it is shown that the requesting carrier can obtain substantially the same economies of scale, scope and density to the comparable functionality without obtaining access to the proprietary aspect. The Commission should take into account other factors in identifying "reasonable substitutes", such as the cost, timeliness and availability of the substitute, and quality.

*Competitive Market Analysis.* If the Commission finds that "reasonable substitutes" are available, it then should determine whether a demonstrably open and competitive wholesale market for these "reasonable substitutes" exists. This market analysis, discussed more fully in Section II.A.3 below, would utilize the competitive analysis undertaken by the Commission in the *BA/NYNEX Merger Order*, the *AT&T Non-Dominance Order*,<sup>26</sup> the regulatory treatment of LEC interexchange services,<sup>27</sup> and other recent Commission decisions.<sup>28</sup> Until such a competitive market does exist, the ILECs should be required to provide the element on an unbundled basis.

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<sup>26</sup> *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) ("*AT&T Non-Dominance Order*").

<sup>27</sup> *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate Interexchange Marketplace, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, 12 FCC Rcd 15756 (1997) ("*ILEC In-Region Interexchange Order*").

<sup>28</sup> *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, Order on Recon., and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545 (1997) ("*LMDS Eligibility Order*"); *Craig O. McCaw and American Tel. & Tel. Co.*, 9 FCC Rcd 5836 (1994), *recon. denied*, 10 FCC Rcd 11786 (1995), *aff'd sub nom., SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

**b. The "Impair" Consideration**

The "impair" consideration must focus on whether denial of access would materially diminish the requesting carriers' ability to offer its desired service. This involves a two-part analysis: (1) the identification as to whether "seamlessly interchangeable" substitute(s) exist; and (2) an analysis as to whether a demonstrably open and competitive market for those interchangeable substitutes exists.

Aside from the absence of "proprietary" aspects, the "impairment" consideration differs from the "necessary" consideration in one important respect. Because customer expectations many times are centered about particular technologies, the "seamlessly interchangeable substitute" threshold will not include certain substitutes that might—from a purely functional perspective—be considered a "reasonable substitute."<sup>29</sup>

Again, the factors to be taken into account in determining whether non-ILEC substitutes are seamlessly interchangeable are familiar—the number of alternative suppliers, quality, and presence of price, economies of scale, scope and density. As for determining whether an open and competitive wholesale market exists, the Commission

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<sup>29</sup> For example (for illustrative purposes only), certain Centrex switch functions may have comparable substitutes in PBX equipment. However, migrating a customer from Centrex to PBX may not be "seamlessly interchangeable" from the perspective of the customer or of the CLEC.

Another way of thinking about the difference draws from the market definition in the DOJ/FTC Horizontal Merger Guidelines. In identifying substitutes, the DOJ or FTC will look to see if customers would turn towards a substitute product in the face of a significant, non-transitory increase in price. One could think of determining the difference between a "reasonable substitute" ("necessary") and a "seamlessly interchangeable substitute" ("impairment") by adjusting what a "significant" price increase is. For example, customers would purchase a "seamlessly interchangeable substitute" perhaps with a 5% non-transitory increase in price; but customer would only turn to a "reasonable substitute" with a 10% non-transitory increase in price.

That said, Covad does not believe that the Commission should—or can—even engage in such a refined cost-analysis. See Section II.A.2 below (focus on presence of competitive market, not prices). However, the principle remains the same—a "seamlessly interchangeable substitute" would be a "closer" substitute than a "reasonable substitute."

should use the same method of competitive analysis. In particular, rather than engage in detailed examination and comparison of costs, the Commission should insist that there exist a demonstrably open and competitive wholesale market for the interchangeable substitute product or service. In such a competitive market, the prices for substitutes for the element will trend towards the forward-looking, TELRIC-based costs.

## **2. Competitive Market Analysis**

The competitive market analysis utilized by the Commission with regularity in recent years can and should be utilized in the UNE Identification context in the event that an ILEC argues that unbundling of a particular element is not “necessary” or would not “impair” a CLEC’s service.<sup>30</sup> This competitive analysis, already a well-accepted component of the Commission’s public interest analysis, is superior to one other standard that has been proposed, the Essential Facilities Doctrine of antitrust law.

In recent years, the Commission has undertaken similar competitive analysis, in the *AT&T Nondominance Order*, the *Bell Atlantic-NYNEX Merger*, the *LMDS Eligibility Order*, and the *ILEC Interexchange Services Order*. All of these competitive analyses contain a common thread and contain several common elements.

*Market Definition/Proper Identification of Substitutes.* As described above, the Commission already will have identified the relevant substitutes (“reasonable substitute” for “necessary” consideration; “seamlessly interchangeable substitute” for “impair” consideration). In identifying those sources, particular attention must be paid to the fact

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<sup>30</sup> See, e.g., *BA/NYNEX Merger Order*, 12 FCC Rcd 19985; *SBC/SNET Merger Order*, 13 FCC Rcd 21292 (1998); *AT&T/TCI Merger Order*, 12 Comm. Reg (P&P) 29 (1998); *MCI/WorldCom Merger Order*, 13 FCC Rcd 18025 (1998); *ILEC In-Region Interexchange Order*, 12 FCC Rcd 15756; and *LMDS Eligibility Order*, 12 FCC Rcd 12545.

that telecommunications markets consist of “point-to-point” and “point-to-multipoint” geographic markets.<sup>31</sup> For example, in looking for substitutes for interoffice transport UNE, the Commission must not only look to see if comparable bandwidth (DS3, OCx) is available from alternative sources, but also look to see if that alternative is available in the particular point-to-point route.

*Supply Elasticity/Ease of Entry.* Even if alternative sources are available, those alternative sources of supply must possess capacity to supply the entire wholesale market if the ILEC were to cease providing the particular UNE. In addition, the Commission must assess the ease of entry into the market for supplying the alternative. If barriers to entry and sunk costs are present, supply of the alternative product is apt to be inelastic and the market for the alternative is less likely to be vibrantly competitive. Certainly, when it comes to laying fiber optic cable, the difficulties of entry are well-documented.<sup>32</sup> Commentators have often stated that entry barriers into network-type industries like data telecommunications are high.

*Existence of Wholesale Market.* Wholesale markets do not spring out of the ground; they must be created. New distribution and sales channels must be generated, and the sales and customer support process is considerably different for the two channels. For example, Covad maintains two separate sales staffs—one staff which handled direct sales to corporate remote-LAN customers, and a separate staff that handles sales to Covad’s

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<sup>31</sup> See, e.g., *BA/NYNEX Merger Order* at ¶ 54; see also *Harris Long Distance Affidavit* at ¶ 17 (citing the need for specific attention to “locational specificity of the underlying facilities”).

<sup>32</sup> See *1999 Annual CLEC Report* at Ch. 9, p. 7 (“Traditional SONET-ring architecture faces severe scalability limitations as a long-term transport solution for data.”); *Harris Long Distance Affidavit* at ¶ 26: (“Simply counting fiber-miles is similar to assuming that an ample supply of wheat grain is all that is necessary to make bread”); *Harris Long Distance Affidavit* at ¶ 75 (“Fiber by itself is not ‘capacity, per se’”).

Internet Service Provider ("ISP") resellers. Not every CLEC with fiber or a switch in a city has made a commitment to enter into the wholesale market for those services. Purchasing from multiple wholesale suppliers also increases requesting carrier costs.

*Number of Alternative Suppliers/Price Issues.* The existence of only one other provider does not establish a competitive market price for the service. The Commission has recognized this fundamental principle in several past proceedings and has taken active policy steps to ensure that multiple providers be present.<sup>33</sup> The absence of four non-ILEC suppliers of substitutes should give the Commission great pause before declaring a particular wholesale market to be competitive. The absence of multiple, similarly situated wholesale suppliers will cause there to be a restriction in output and increase in prices from a competitive market.<sup>34</sup>

Although Covad does not urge the Commission to adopt a "nose-counting" test in all instances, such an approach may be used as a complement to price and cost analysis. With local competition information scarce, Covad does not believe that the Commission can now reliably determine "cost-difference" thresholds, as suggested by the *Notice*. At

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<sup>33</sup> See *LMDS Eligibility Order*, 12 FCC Rcd 12545 (declaring incumbent LECs and incumbent cable companies ineligible to acquire in-region LMDS licenses because an independently owned potential entrant into local voice, video and data markets was in the public interest). The Commission made similar decisions in preventing current DBS satellite slot holders from acquiring the Advanced DBS satellite slot in 1997 and in establishing a "spectrum cap" for CMRS mobile spectrum. Those policies have been a success: EchoStar has emerged as a "price-cutting" third competitor to cable and DirecTV, and CMRS price wars in locations of five to six rival cellular/PCS carriers are legendary.

<sup>34</sup> Cournot's model of competition shows that the competitiveness of an industry is directly related to the number of firms supplying the market:

$$\{N/(N+1)\} \times Q(c) = Q(nc)$$

Where "N" is the number of rival suppliers, Q(c) is perfectly competitive market output, and Q(nc) is actual industry output predicted by the Cournot Model. James Friedman, *Oligopoly Theory*, Ch. 2 (1982).

this time, the only option available to the Commission may be ensuring that an open and competitive wholesale market, with a particular emphasis on ensuring that multiple suppliers have excess capacity to serve the wholesale market.

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The Commission has the expertise to take all of the above factors of its competitive analysis into account in assessing whether a wholesale market for alternatives actually exists. Covad believes that this analysis should be fully utilized in the UNE Identification process.

### **3. Relevance of the Essential Facilities Doctrine**

As discussed above, Covad believes that a complete competitive market analysis that focuses upon whether an open and competitive wholesale market exists for a substitute is consistent with Commission precedent and satisfies the Supreme Court's mandate that the Commission look to "alternative" sources of supply for elements during the UNE Identification process.

Some ILECs are likely to invite the Commission to adopt the "Essential Facilities" Doctrine as an appropriate standard for UNE Identification, arguing that unless a potential UNE would be an "essential facility" under the antitrust law, it should be exempt from the unbundling requirements. The Commission should decline those invitations. These arguments must be seen for what they are, attempts to limit implementation of the pro-competitive policies adopted by Congress.

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This formula estimates that a market will realize only 67% of the full benefits of competition in the presence of two rival suppliers. In the presence of three rivals, output will be 75% of a competitive market—an increase of 8% over two suppliers. With four suppliers, output will be 80%; with five rivals, 84.3%.

Of course, if the Commission determines that an unbundled element is an “essential facility” or that failure to provide access would otherwise violate the antitrust laws, the Commission should order that such element or access be made available. However, a finding that an antitrust violation—while certainly a sufficient condition—is not a necessary condition for Commission action.

It has been long established that administrative agencies (and the Commission in particular) governed by the public interest standard are *not* limited to policing the antitrust laws. Most particularly, administrative agencies do not use the antitrust laws as the sole arbiter of the “public interest” standard. Rather, the Commission must “make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations.”<sup>35</sup>

The Commission’s public interest mandate results directly from the fact that the Commission must solve two discrete economic problems that do not come under the mandate of the antitrust laws: (1) assuring that the regulated firms under the Commission’s jurisdiction do not engage in anticompetitive behavior or charge captive ratepayers monopoly prices; and (2), where practical, *affirmatively* formulating regulatory paradigms designed to improve overall market performance in both the short-run and especially, given the huge sunk costs inherent to the telecommunications industry, the long-run.<sup>36</sup> Given this

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<sup>35</sup> *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (quoting *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)); *see also FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978); *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 755-62 (1973) (regulatory agencies must consider “matters relating to both the broad purposes” of their enabling statutes “and the fundamental national economic policy expressed in the antitrust laws”); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953) (“There can be no doubt that competition is a relevant factor in weighing the public interest.”).

<sup>36</sup> *See* L. Spiwak, *Antitrust, the “Public Interest” and Competition Policy: The Search for Meaningful Definition in a Sea of Analytical Rhetoric*, ANTITRUST REPORT (Matthew Bender Dec. 1997) at 2, 6-14

task, courts have held that the Commission's mandate is significantly *broad*er than that of the antitrust enforcement agencies, because the Commission is "entrusted with the responsibility to determine when and to what extent the public interest would be served by competition in the industry."<sup>37</sup>

As a result, public interest regulation and antitrust approaches analyze market performance from different perspectives—public interest regulation seeks to promote competitive rivalry directly "through rules and regulations" while antitrust enforcement seeks to foster competitive rivalry "indirectly by promoting and preserving a process that tends to bring them about."<sup>38</sup>

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([http://www.phoenix-center.org/library/neo\\_comp.doc](http://www.phoenix-center.org/library/neo_comp.doc)). It should be noted, however, that the Commission's challenge is made more complex because telecommunications is clearly an industry characterized by rapid change and innovation. This challenge is even more evident with the passage of the Telecommunications Act of 1996. See, e.g., *Turner Broadcasting System, Inc., v. FCC*, 117 S. Ct. 1174, 1189 (1997) (regulatory schemes concerning telecommunications have "special significance" because of the "inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change"); *Denver Area Educational Telecommunications Consortium, Inc., v. FCC*, 518 U.S. 727, 742 (1996) (Court is "aware . . . of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, see, e.g., Telecommunications Act of 1996 . . ."). Indeed, the idea that the Communications Act is robust enough to deal with new technologies and issues pre-dated the 1996 Act. See *Columbia Broadcasting, Inc v. Democratic National Committee*, 412 U.S. 94, 102 (1973) ("The problems of regulation are rendered more difficult because the . . . industry is dynamic in terms of technological change"); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (The "Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects" of the telecommunications industry).

<sup>37</sup> *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953); *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the [DOJ] . . . must apply" because administrative agency is not required to "serve as an enforcer of antitrust policy in conjunction" with the DOJ or FTC; thus, while agency "must include antitrust considerations in its public interest calculations . . . it is not bound to use antitrust principles when they may be inconsistent with the [agency's] regulatory goals"); see also *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (Congress, through the Communications Act, "gave the Commission not niggardly but expansive powers."); *Craig O. McCaw*, Memorandum Opinion & Order, 9 FCC Rcd. 5836 (1994), *aff'd*, *SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (FCC's "jurisdiction under the Communications Act gives us much more flexibility and more precise enforcement tools that the typical court has").

<sup>38</sup> *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.), *cert. denied*, 499 U.S. 931 (1991).

Even assuming *arguendo* the Commission should be convinced to apply some aspects of the Essential Facilities Doctrine in deciding what elements are to be unbundled, it is crucial to recognize that the Essential Facilities Doctrine still does *not* give the BOCs the “limiting” immunity they are likely to seek. In particular, the Essential Facilities doctrine does not shield BOCs from refusing to provide access to rivals at unreasonable reasonable cost or and on a discriminatory basis.

Essential Facilities case law sets forth four elements necessary to establish liability for refusals to provide access to a competitor:

- (1) Control of the essential facility by a monopolist;
- (2) A competitor's inability *practically or reasonably* to duplicate the essential facility;
- (3) The denial of the use of or access to the facility to a competitor; and
- (4) The feasibility of providing the facility by the monopolist.<sup>39</sup>

Over the last several years, there has been significant debate over the exact circumstances in which an “essential” input is “capable” of duplication. While this debate has been spirited, nearly everyone seems to agree that the Essential Facilities standard requires something more than just “expensive” entry costs.<sup>40</sup> For this reason, courts have found everything from cable programming<sup>41</sup> to airline reservation systems<sup>42</sup> capable of

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<sup>39</sup> *MCI Communications Co. v. AT & T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983). It is interesting to note that the words “essential” and “facility” *do not* occur in Section 251(d)(2)—further evidence of Congressional intent not to codify the doctrine.

<sup>40</sup> See generally Phillip Areeda, *Essential Facilities: An Epithet In Need Of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

<sup>41</sup> Cf. *TV Communications Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1062 (D. Colo. 1991), *aff'd*, 964 F.2d 1022 (10th Cir.), *cert. denied*, 113 S. Ct. 601 (1992); *Futurevision Cable Systems of Wiggins v. Multivision Cable TV Corp.*, 789 F. Supp. 760 (S.D. Miss. 1992), *aff'd*, 986 F.2d 1418 (5th Cir. 1993).

“duplication.” However, as highlighted above, the Essential Facilities doctrine also requires the fact-finder to look at whether it is *practical* or *reasonable* – in the context of the conditions of the relevant market – to duplicate the essential input as well. ILEC local networks remain the quintessential example of an essential input possessing considerable economies of scale, scope and density that cannot be “reasonably and practically” duplicated in many areas of the United States on the scale necessary for ubiquitous coverage.

Indeed, today’s circumstances are not all that different than fifteen years ago when the Seventh Circuit held that AT&T violated Section 2 of the Sherman Act by refusing to connect MCI to its local network. There, AT&T had complete control over the local distribution facilities that MCI required. As such, the court found those local facilities “essential” for MCI to offer FX and CCSA service. In other words, AT&T’s refusal to share its local facilities to accommodate MCI’s request to use AT&T facilities did not *impede* competition – it *eliminated* it altogether.<sup>43</sup>

Of course, some would now argue that with the 1996 Act and technological developments, any claim that access to local facilities is an “essential” facility should fail because the local loop is no longer considered a “natural” monopoly and there are plentiful alternative sources of supply. However, even if one declines to describe the local loop as a “natural” monopoly, one does not thereby refute the reality that ILEC local facilities retain huge shares of the local market and therefore remain a “*de facto*” monopoly. Facilities-

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<sup>42</sup> *Alaska Airlines Inc. v. United States Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992).

<sup>43</sup> *MCI*, 708 F.2d at 1132-33.

based CLEC shares of the market remain well in the single digits.<sup>44</sup> Moreover, despite some recent victories and the final promulgation of effective collocation rules, achieving full-scale facilities-based entry remains difficult.<sup>45</sup> This goal is made even more difficult by the rapid re-concentration of both the ILEC and cable industries.<sup>46</sup>

Finally, ILECs also have no legitimate business justification to deny rivals access to their local facilities.<sup>47</sup> In fact, given the fact that CLECs must pay “cost” plus a “reasonable profit” to ILECs when they acquire unbundled elements, it is difficult to understand any *legitimate* business interest for the ILECs to refuse to provide those unbundled elements. ILEC efforts to obtain exemptions from unbundling must, by definition, be related to simple anticompetitive goals of keeping new entry to an absolute minimum. As a result, ILECs cannot use this defense to excuse their refusals to provide CLECs access and instead must be seen for what they are—attempts to “warehouse” their local facilities to monopolistic ends.

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<sup>44</sup> A recent FCC Staff study makes this point clear. FCC Common Carrier Bureau, Industry Analysis Division, *Local Competition* (Dec. 1998) (“FCC Staff Local Competition Study”). FCC Staff found that CLECs provided less than 3% of the nation’s switched access lines, only approximately one-quarter of which were on their own facilities. *Id.* at 1, The FCC Staff Report also dispels two myths about local entry: resale entry outnumbered unbundled loops by a factor of approximately 10:1, and 40% of CLEC resold lines were serving *residential* customers. *Id.* at 2.

<sup>45</sup> See, e.g., George S. Ford, *Opportunities for Local Exchange Competition Are Greatly Exaggerated*, ELECTRIC LIGHT & POWER (April 1998) at 20-21 ([http://www.phoenix-center.org/library/ford\\_1.doc](http://www.phoenix-center.org/library/ford_1.doc)).

<sup>46</sup> See, e.g., BUSINESS WEEK January 11, 1999 (in the words of SBC CEO Ed Whitacre: “We can sit here and get picked on” . . . “or get bigger and have more clout.”); see also *Reconcentration of Telecommunications Markets After the 1996 Act: Implications for Long-Term Market Performance (Second Edition)*, PHOENIX CENTER POLICY PAPER SERIES NO. 2 (July 1998) (<http://www.phoenix-center.org/pcpp/pcpp2.doc>).

<sup>47</sup> See, e.g., *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1380-81 (9th Cir. 1992).

#### **4. Consideration of Other Factors**

As discussed above, Section 251(d)(2) clearly contemplates that the Commission consider other factors in identifying UNEs, and the Supreme Court expressly directed the Commission to take into account the purposes of the Act in this process. Covad proposes two additional factors, both of which are grounded in the act: the rapid development of competition, and the deployment of competitive broadband services to “all Americans.”

*Rapid Competition.* In the 1996 Act, Congress clearly expressed its desire for the “rapid” development of competition in all telecommunications markets. National minimum standards for unbundled network elements clearly facilitates rapid entry into these markets. As a result, in identifying any particular UNE, the Commission should assess and balance whether having a consistent and predictable national unbundling principle for the element in question would promote rapid entry into local telecommunications markets. At this point—with competition still in its infancy and with CLECs developing and financing their entry plans—this factor should play a principal and perhaps dominant role in this proceeding.

Local competition and alternative CLEC networks remain in their infancy. As reported by FCC Staff in December, 1998, not even 3% of the nation’s switched access lines are provided by competitive providers, and not even a quarter of them over CLEC end-to-end facilities.<sup>48</sup> Even in downtown city districts, the number of “addressable” consumers exclusively through “on-net” service is minimal; an estimated 105,000

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<sup>48</sup> FCC Staff Local Competition Report at 1.

buildings in the entire United States.<sup>49</sup> CLECs can only address the other millions of buildings and homes through the use of the ILEC network.

CLECs are still formulating different and innovative business plans based on the availability of unbundled elements. By obtaining unbundled dedicated transport, unbundled loops and physical collocation, “fiber-less” or “smart build” CLECs like Covad and Allegiance can “address” substantial numbers of businesses and residential consumers in a manner much faster than digging up city streets. Indeed, with the Commission’s recent reform of the physical collocation rules, fiber-less CLECs can be expected to even further outstrip (in number of central offices served) the geographic scale of CLEC fiber ring deployment. All of this growth is, however, predicated upon the continued nationwide availability of unbundled elements such as loops and transport.

*Broadband Deployment.* A second additional factor that the Commission must consider in identifying UNEs is whether ordering the UNE would promote the availability of competitive broadband services to Americans.<sup>50</sup> As described below, Covad believes that this factor should be used to order universal availability of xDSL-conditioned loops—regardless of ILEC xDSL or ISDN entry plans, regardless of loop length, regardless of the presence of intervening electronics or fixtures in the facility such as load coils, remote terminals, digital loop carriers, or bridged taps.

The availability of xDSL-conditioned loops on an unbundled basis *nationwide* would facilitate the ability of CLECs like Covad to deliver their services to residential and rural America. In addition, the competitive pressure of CLEC entry would then encourage

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<sup>49</sup> 1999 *Annual CLEC Report*, Chapter 6, Table 10.

ILECs to deploy competing services in those same areas. ILECs who resist making DSL-conditioned loops available universally should be prepared to explain exactly why they need to reserve the right to prevent some of their customers from ordering advanced, xDSL services.

**B. Procedural Aspects for “UNE Identification” and “UNE Exemption” Proceedings**

In Section III.A of the *Notice*, the Commission presented several questions related to the procedural and burden of proof aspects of identifying UNEs in this and other proceedings.<sup>51</sup> Covad believes that the Commission should establish several procedural rules, including presumptions and payment of costs, that will minimize the incentive of ILECs to game the UNE-identification process to raise unnecessarily the costs of their CLEC rivals.

Business plans and the future development of local competition hang in the balance of these proceedings. The Commission must keep in mind the recent findings of FCC Staff, who concluded that that “information on local competition is scarce, dependent primarily on press releases and company reports that differ in scope and presentation.”<sup>52</sup> Relying on such information is not good enough. In undertaking this competitive analysis, the Commission must rely on real, hard and established data, and not on “mere company

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<sup>50</sup> 47 U.S.C. § 157 note.

<sup>51</sup> In this section, Covad will refer to such proceedings in two ways. as “UNE Identification” and “UNE Exemption” Proceedings. A UNE Identification proceeding—like this one—seeks to determine which network elements ILECs must provide unbundled access to. A UNE Exemption proceeding—possibly contemplated by the Commission as a “sunset” proceeding, *FNPRM* at ¶ 11—is a subsequent proceeding in which the Commission and/or ILECs may reassess the availability of previously-ordered UNEs.

<sup>52</sup> FCC Staff Local Competition Report at 3.

announcements” of entry or lists of “potential entrants.”<sup>53</sup> The Commission should continue the data-collection efforts of its Industry Analysis Division, but in the interim, the Commission must maintain a high presumption against ILECs that argue about “alternative sources of supply” to keep particular elements out of Rule 51.319.

Frankly, ILECs have demonstrated their desire to fight unbundling requirements with every opportunity. Unleashing element-by-element, *Bleak House* type litigation would impose significant personnel costs far in excess of the benefits and would involve not simply legal efforts. Considerable effort would be required from network engineers, designers, marketing, acquisition and customer support staff so as to provide a sufficient factual record to support these legal presentations. These costs would have an especially adverse impact on start-up CLECs, who do not have a stable of professional witnesses like the ILECs.

The fact is, CLECs are more interested in building networks than in litigating with the ILECs. Not every CLEC has the legal firepower and can spare the engineering support to even participate in every relevant FCC proceeding, *let alone 51 contemporaneous PUC proceedings*. Even in this well-publicized docket, Covad knows of several facilities-based CLECs that depend on the availability of elements but who will not participate because of their limited resources.

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<sup>53</sup> Robert Harris once testified that the Commission cannot rely on “mere company announcements, on new ‘potential entrants,’ and on fiber deployment alone” in its competitive analysis. Harris Long Distance Affidavit at ¶ 75.